Supreme Court, U.S.
FILED
NOV 13 2000
CLERK

(6)

No. 99-1871

In The Supreme Court of the United States

NOV 13 2000

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS,
Petitioners,

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* UNITED SOUTH AND EASTERN TRIBES, INC. ("USET") IN SUPPORT OF THE PETITIONERS

William W. Taylor, III
Counsel of Record
Michael R. Smith
Eleanor H. Smith
ZUCKERMAN, SPAEDER, GOLDSTEIN, TAYLOR & KOLKER L.L.P.
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036-2638
Telephone (202) 778-1800
Counsel for *Amicus Curiae*

November 13, 2000

3 | 44

QUESTION PRESENTED

Whether Exemption 5 to the FOIA protects records, not otherwise obtainable from the Department of the Interior or from Indian tribes, if those records are shared between the Department and an Indian tribe in furtherance of the trust obligations of the United States to the tribe?

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 7

ARGUMENT

I. THE TRUST RELATIONSHIP IS A SUFFICIENT LEGAL REASON FOR THE DEPARTMENT TO WITHHOLD TRUST RECORDS 10

A. Trust Records Are Not "Improperly Withheld" Under FOIA 10

B. Failing to Recognize a FOIA Exemption for Records Shared to Promote Confidential Trust-Related Consultations Would Damage the Trust Relationship, Jeopardize Trust Assets, and Harm Tribes that Depend on Trust Assets for Their Existence 12

II. EXEMPTIONS TO THE FOIA NOT INVOKED BY THE DEPARTMENT IN THIS CASE PROTECT TRUST RECORDS SHARED BETWEEN THE UNITED STATES AND AN INDIAN TRIBE 17

A. Exemption 3 Bars Disclosure of Trust Records.....18

B. Exemption 4 Bars Disclosure of Trust Records.....19

C. Exemption 7 Bars Disclosure of Trust Records.....21

CONCLUSION.....23

TABLE OF AUTHORITIES

Page

Cases

Cherokee Nation v. Georgia,
30 U.S. (5 Pet.) 1 (1831).....2, 11, 16
CIA v. Sims,
471 U.S. 159 (1985).....18
Continental Oil Co. v. United States,
330 F.2d 347 (9th Cir. 1964).....20
County of Oneida v. Oneida Indian Nation,
470 U.S. 226 (1985).....2, 15
Critical Mass Energy Project v. NRC,
931 F.2d 939 (D.C. Cir.), *vacated & reh'g en banc granted*, 942 F.2d 799 (D.C. Cir. 1991), *grant of summary judgment to agency aff'd en banc*, 975 F.2d 871 (D.C. Cir. 1992).....19
Department of Justice v. Tax Analysts,
492 U.S. 136 (1989).....10
Fedders Corp. v. FTC,
494 F. Supp. 325 (S.D.N.Y.), *aff'd*, 646 F.2d 560 (2d Cir. 1980).....22
Federal Open Market Comm. v. Merrill,
443 U.S. 340 (1979).....16
FTC v. Grolier,
462 U.S. 19 (1983).....7
GTE Sylvania v. Consumers Union of the United States,
445 U.S. 375 (1980).....10
John Doe Agency v. John Doe Corp.,
493 U.S. 146 (1989).....21

Klamath Water Users Assoc. v. The Department of the Interior,
189 F.3d 1034 (9th Cir. 1999).....7
Manna v. Department of Justice,
51 F.3d 1158 (3rd Cir. 1995).....22
NLRB v. Sears, Roebuck & Co.,
421 U.S. 132 (1975).....7, 8, 16
Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978).....16
Seminole Nation v. United States,
316 U.S. 286 (1942).....3, 11
United States v. AT&T,
642 F.2d 1285 (D.C. Cir. 1980).....20
United States v. Mitchell,
463 U.S. 206 (1983).....11
United States v. Weber Aircraft Corp.,
465 U.S. 792 (1984).....7
Washington Post Co. v. HHS,
690 F.2d 252 (D.C. Cir. 1982).....19
Worcester v. Georgia,
31 U.S. (6 Pet.) 515 (1832).....2

Treaties and Statutes

5 U.S.C. § 552(b)(1)-(9).....10
5 U.S.C. § 552(b)(3).....18
5 U.S.C. § 552(b)(4).....19
5 U.S.C. § 552(b)(5).....7
5 U.S.C. § 552(b)(7).....21
5 U.S.C. § 552(b)(7)(A).....21
5 U.S.C. App.....11

25 U.S.C. § 162a(d).....12, 13, 22
25 U.S.C. § 162a(d)(5).....14, 18
25 U.S.C. § 162a(d)(8).....13
25 U.S.C. § 166.....11
25 U.S.C. § 175.....15
25 U.S.C. § 177.....13, 15, 18, 22
25 U.S.C. § 324.....13, 18
25 U.S.C. § 396-396g.....13, 18
25 U.S.C. § 406-407.....13, 18
25 U.S.C. § 415-415d.....13, 18
25 U.S.C. § 564m.....13, 18
25 U.S.C. § 941i.....14
25 U.S.C. § 1403(b)(1).....14
25 U.S.C. § 1724.....4
25 U.S.C. § 1724(g) and (h).....4
25 U.S.C. § 2106.....13, 14, 18
31 U.S.C. § 3730.....21
American Indian Trust Fund Management Reform Act of 1994, P. L 103-412, § 102.....13, 14
American Indian Trust Fund Management Reform Act of 1994, P. L 103-412, § 204.....14
Treaty of Canandaigua (November 11, 1794), 7 Stat. 11.....15

Other Authorities

Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 65 Fed. Reg. 13298 (March 13, 2000).....2
Indian Trust Funds, United States General Accounting Office Report to Congress (September 2000).....3, 13

Proposed Fed. R. Evid. 503(b)(3).....20
Restatement (Second) of Trusts § 170.....13
Restatement (Second) of Trusts § 172.....13
Restatement (Second) of Trusts § 173.....13
Restatement (Second) of Trusts § 174.....13
Restatement (Second) of Trusts § 175.....13
Restatement (Second) of Trusts § 176.....13
Restatement (Second) of Trusts § 177.....13

In The Supreme Court of the United States

No. 99-1871

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS,
Petitioners,

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF OF *AMICUS CURIAE* UNITED SOUTH AND EASTERN TRIBES, INC. ("USET") IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*

The United South and Eastern Tribes, Inc. ("USET") is an association of twenty-four Indian tribes located in the southern and eastern United States; each of them is recognized by the United States, and to each of them the United States owes trust responsibilities.[1] The Court first

---

[1] *Amicus* member tribes are the Alabama-Coushatta Tribe of Texas, the Aroostook Bank of Micmac Indians, the Catawba Indian Nation, the

addressed the trust responsibilities of the United States to Indian tribes almost two hundred years ago in two cases involving a USET member tribe. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (voiding transfer to the state of land guaranteed to the Cherokee Nation by federal treaty and otherwise barring enforcement of state laws on tribal land); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555 (1832) (reaffirming duty of federal government to protect assets of the Cherokee Nation). The Court has reiterated these trust responsibilities in cases involving other USET member tribes. *See, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (reiterating trust responsibilities and recognizing federal common law

---

Chitimacha Tribe of Louisiana, the Coushatta Tribe of Louisiana, the Eastern Band of Cherokee Indians, the Cayuga Nation, the Houlton Band of Maliseet Indians, the Jena Band of Choctaw Indians, the Mashantucket Pequot Tribe, the Miccosukee Tribe of Florida, the Mississippi Band of Choctaw Indians, the Mohegan Tribe of Connecticut, the Narragansett Indian Tribe, the Oneida Indian Nation, the Passamaquoddy-Indian Township, the Passamaquoddy-Pleasant Point, Penobscot Indian Nation, Poarch Band of Creek Indians, Seminole Tribe of Florida, Seneca Nation of Indians, St. Regis Band of Mohawk Indians, Tunica-Biloxi Tribe of Louisiana, and the Wampanoag Tribe of Gay Head (Aquinnah). Federal recognition of these tribes is reflected at Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 65 Fed. Reg. 13298 (March 13, 2000).

Counsel for the parties have consented to the filing of this *amicus curiae* brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, *Amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *Amicus*, its members or its counsel, has made a monetary contribution to the preparation or submission of this brief.

cause of action under the Trade and Intercourse Act to prohibit transfer of Indian land without federal approval); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (federal government breached its fiduciary duties to tribe by dispersing treaty annuity payments to tribal officials known for mismanagement).

USET has an interest in this Freedom of Information Act case because its outcome could either protect or damage consultations between the United States and Indian tribes. These consultations are essential if the United States is to fulfill its trust responsibilities to Indian tribes.

The United States and Indian tribes have maintained the confidentiality of their trust-related consultations for hundreds of years. These confidential consultations include, but are not limited to, efforts by the United States to meet its fiduciary duties to protect tribal trust assets. The United States has in trust some $3 billion in invested tribal funds, over 54 million acres of tribal land, and large amounts of timber, oil, gas, coal, and water resources belonging to tribes.[2]

Trust consultations between the United States and Indian tribes arise in many different circumstances and involve confidential information. Consultations involve litigation prosecuted by the United States on behalf of, or jointly with, the tribes, such as the state water rights adjudication involved in this case. It also includes the land

---

[2] *Indian Trust Funds*, United States General Accounting Office Report to Congress (September 2000) at 3.

claims litigation brought by USET members the Cayuga Nation, the Seneca Nation, the Oneida Nation and the St. Regis Band of Mohawk; the United States has intervened in all of these land claim cases as a co-plaintiff.[3] Trust-related consultations also involve management of tribal trust funds, including funds from land claim settlements of USET members the Aroostook Band of Micmac Indians, the Catawba Indian Nation, the Houlton Band of Maliseet Indians, the Mashantuckett Pequot Tribe, Passamaquoddy-Indian Township, Passamaquoddy-Pleasant Point, and the Penobscot Indian Nation.[4] They also involve management of tribal land held in trust by the United States, including the reservations of the USET members just mentioned and of the Coushatta Tribe of Louisiana, the Eastern Band of Cherokee Indians, the Miccosukee Tribe of Florida, the Mohegan Tribe of Connecticut, the Narragansett Indian Tribe, the Poarch Band of Creek Indians, the Seminole Tribe of Florida, and the Wampanoag Tribe of Gay Head (Aquinnah).[5] In addition, not only do the consultations often concern how best to protect tribal trust assets in

[3] *Cayuga Indian Nation of New York et al. v. State of New York, et al.*, 80cv930 (N.D.N.Y.) (United States motion to intervene granted Nov. 30, 1992); *Oneida Indian Nation of New York et al. v. County of Oneida, et al.*, 74 cv187 (N.D.N.Y.) (United States motion to intervene granted June 3, 1998); *Seneca Nation of Indians v. State of New York, et al.*, 85cv411(W.D.N.Y.) (United States motion to intervene granted January 29, 1998); *Seneca Nation of Indians v. State of New York, et al.*, 93cv688 (W.D.N.Y.) (United States motion to intervene granted on April 28, 1998); *Canadian St. Regis Band of Mohawk Indians, et al. v. State of New York, et al.*, 82cv783 (N.D.N.Y.) (United States motion to intervene granted October 28, 1998).

[4] *See, e.g.*, 25 U.S.C. § 1724.

[5] *See, e.g.*, 25 U.S.C. § 1724(g) and (h).

administrative activities, such as the pending deliberations about the Klamath Project Operations Plan, but they also involve deliberations over whether, to whom and under what conditions USET tribes and other tribes should license, permit, lease or otherwise make available their limited resources to third-parties.

USET submits this brief in support of the position of Petitioners the United States Department of the Interior and the Bureau of Indian Affairs ("Department" and "Bureau") and to urge reversal of the decision of the United States Court of Appeals for the Ninth Circuit. USET agrees with the Petitioners that Exemption 5 to the FOIA protects records shared in consultations between the United States and an Indian tribe in furtherance of their trust relationship. We believe, further, that the law requires protection of those records for other reasons, which can be addressed in this case or left for decision in another.

First, the trust relationship itself is sufficient legal reason to justify a federal agency's decision to withhold confidential records regarding tribal assets held in trust by the United States. As trustee of tribal assets, the United States has a fiduciary duty to maintain the confidentiality of information about trust assets. The question of public access under the FOIA arises *only* because tribes and the United States share records containing confidential information in furtherance of the trust relationship between them. If the FOIA is interpreted to permit the public to obtain these records, it will place the United States in violation of its trust obligations and seriously inhibit communication between tribes and the United States. It is not possible to preserve the

integrity and utility of consultations between trustee and beneficiary and simultaneously to permit the general public to invade the confidentiality of those consultations.

Second, while the Department has invoked only Exemption 5 in this case, other exemptions to the FOIA protect trust records from public disclosure. Exemptions 3, 4 and 7(A) are particularly important to trust records. These exemptions protect records exempt by statute (Exemption 3), records submitted by tribes and containing confidential or privileged commercial or financial information (Exemption 4), or records compiled for law enforcement purposes the disclosure of which could interfere with enforcement proceedings (Exemption 7(A)).

STATEMENT OF THE CASE

The question presented by the parties in this case is whether records of confidential consultations concerning protection of tribal assets, as to which the United States is a trustee, are "intra-agency" records protected from disclosure by Exemption 5 to the Freedom of Information Act, 5 U.S.C. § 552(b)(5). A divided Court of Appeals for the Ninth Circuit incorrectly held that the statutory term "intra-agency" must be interpreted to exclude these trust records. *Klamath Water Users Assoc. v. The Department of the Interior*, 189 F.3d 1034, 1039 (9th Cir. 1999). Using the trust relationship as a reason for disclosure rather than as a reason for confidentiality, a majority of the panel erroneously reasoned that the "direct interest" of Indian tribes in tribal assets entrusted to the United States requires that records concerning trust-related consultations be disclosed to the public. *Id.* at 1038.

Exemption 5 to the FOIA provides that the Act "does not apply to matters that are . . . (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Court has construed this language to "exempt those documents . . . [that are] normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *see also United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) ("[e]xemption 5 simply incorporates civil discovery privileges"); *FTC v. Grolier*, 462 U.S. 19, 26 (1983) (same). Exemption 5 thus incorporates discovery

privileges like the deliberative process, attorney-client, and work product privileges. *NLRB*, 421 U.S. at 149-150.

Here, the parties agree that the records at issue would be protected from discovery in litigation by the deliberative process and attorney work product privileges, as the district court found. Appendix B to Petition for Writ of Certiorari at 31a-32a and 56a-65a. They disagree only with respect to whether these records meet the test of Exemption 5 that they be "inter-agency or intra-agency" records. Respondent asserts that the seven records at issue are not "inter-agency or intra-agency" records because the Klamath Tribes ("Tribes") created six of them and shared them with the Bureau and because the Bureau shared the seventh with the Tribes. The Department demonstrated that all the records were created and shared in furtherance of the Bureau's role, as tribal trustee, in enforcing the Tribes's water rights at the Klamath River Basin. Joint Appendix 33-39.

Respondent "acknowledges the significant fiduciary and trust responsibilities that the United States owes to Tribes." Respondent's Brief in Opposition to the Petition for a Writ of Certiorari at 17. Respondent does not dispute that the Department, through the Bureau, is required by federal law to present water rights claims on behalf of the Tribes in the state adjudication and in the Bureau of Reclamation deliberations regarding Klamath River Basin. Nor does Respondent dispute that the Bureau and the Klamath Tribes prepared the records at issue in the common pursuit of the trust responsibilities of the United States to protect the Tribes' water rights in these state and federal proceedings. *Id.* at 10.

Respondent nevertheless seeks access to the legal and strategic thought processes of the Bureau and the Tribes as reflected in records shared between the Bureau and the Tribes in trust-based consultations. It is undisputed that there would be no access to any of these records if the United States as trustee and the tribes as beneficiary had not shared them. The issue thus presented is whether the decision to share otherwise privileged and confidential records during trust consultations makes those records available to the general public.

ARGUMENT

I. THE TRUST RELATIONSHIP IS A SUFFICIENT LEGAL REASON FOR THE DEPARTMENT TO WITHHOLD TRUST RECORDS.

A. Trust Records Are Not "Improperly Withheld" Under FOIA.

The FOIA requires public disclosure only of agency records "improperly withheld." *GTE Sylvania v. Consumers Union of the United States*, 445 U.S. 375, 386 (1980) (*quoting* 5 U.S.C. § 552(a)(4)(B)). Records that meet the requirements of any of the nine enumerated exemptions to the FOIA are not improperly withheld. 5 U.S.C. § 552(b)(1)-(9). Further, records are not improperly withheld, even if they meet no particular FOIA exemption, where withholding them is required to satisfy an important governmental obligation independent of FOIA. *GTE Sylvania*, 445 U.S. at 386. In *GTE Sylvania*, this Court held that records not subject to an exemption were not "improperly withheld" because a protective order barred their disclosure. *Id.* The Court explained that the protective order, by enjoining disclosure of the requested records, deprived the agency of discretion to disclose them. *Id.* The Court has since reiterated that records are not "improperly withheld" under FOIA where non-disclosure is required to "serve a critical goal independent of FOIA." *Department of Justice v. Tax Analysts*, 492 U.S. 136, 155 (1989).

The trust obligations of the United States to Indian tribes and individuals require the United States to withhold records shared between them in trust. The trust relationship is intended to protect tribal sovereignty by protecting tribal assets from exploitation or interference. *See, e.g., Cherokee Nation*, 30 U.S. (5 Pet.) at 16. As trustee of tribal assets, the United States is held to "'exacting fiduciary standards.'" *Seminole*, 316 U.S. at 296-97.

Fundamental to the trust relationship is the trustee's "duty to the beneficiary not to disclose to a third person information which he has acquired as trustee when he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary." Restatement (Second) of Trusts §170 cmt. S (1959). Disclosure of trust records would give rise to a breach of trust claim by the tribe. *See, e.g., Seminole*, 316 U.S. at 297; *United States v. Mitchell*, 463 U.S. 206, 225-6 (1983) (applying common law rules of trust to hold that United States breached its trust obligations to tribe).

Congress expressly exempted from the open records and meetings requirements of the Federal Advisory Committee Act consultations regarding tribal trust fund management between the United States, tribes and tribal associations, such as USET. 25 U.S.C. § 166. Federal law provides that "[t]he activities of the Department of the Interior associated with the Department's consultation with Indian tribes and organizations related to the management of funds held in trust by the United States for Indian tribes shall be exempt from the Federal Advisory Committee Act (5 U.S.C. App.)" *Id.* This statutory prohibition against public

access to trust consultations would be rendered useless were trust records subject to disclosure under the FOIA. Just as federal agencies must withhold records pursuant to a protective order, federal agencies must protect the confidentiality of trust records because they have a fiduciary duty to do so.

B. Failing to Recognize a FOIA Exemption for Records Shared to Promote Confidential Trust-Related Consultations Would Damage the Trust Relationship, Jeopardize Trust Assets, and Harm Tribes that Depend on Trust Assets for Their Existence.

Failing to recognize a FOIA exemption for records shared to promote confidential trust-related consultations would damage the trust relationship, jeopardize trust assets, and harm tribes that depend on trust assets for their existence. Federal law requires the United States to hold and manage tribal funds in trust accounts,[6] to assert claims to

[6] Section 162a(d) of Title 25 of the United States Code provides that "[t]he Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following: (1) Providing adequate systems for accounting for and reporting trust fund balances. (2) Providing adequate controls over receipts and disbursements. (3) Providing periodic, timely reconciliations to assure the accuracy of accounts. (4) Determining accurate cash balances. (5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis. (6) Establishing consistent, written policies and procedures for trust fund management and accounting. (7) Providing adequate staffing, supervision, and training for trust fund management and accounting. (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands". 25 U.S.C. § 162a(d); *see also* The American Indian Trust Fund Management Reform Act of 1994, P. L 103-412, § 102.

land, water and other trust assets against third-parties,[7] to appropriately manage tribal natural resources,[8] to assist tribes in negotiating commercial and financial agreements with third-parties,[9] and to approve purchases, leases, licenses and other agreements between the tribes and third-parties regarding the sale or use of trust assets.[10]

Federal law also obligates the United States to consult with Indian tribes regarding trust assets.[11] For example, the Secretary of the Interior must account for and advise tribes concerning funds in federal trust accounts, and over 200 tribes have funds held in trust fund accounts managed by the United States, including many USET Tribes.[12] The Secretary must report to each of these tribes

[7] *See, e.g.*, 25 U.S.C. § 177 ("Trade and Intercourse Act" or "Non-Intercourse Act") and § 564m (preserving water rights of Klamath Tribes established by treaty with the United States).

[8] 25 U.S.C. § 162a(d)(8).

[9] *See, e.g.*, 25 U.S.C. § 2106.

[10] *See, e.g.*, 25 U.S.C. §§ 177, 324, 396-396g, 406-407, 415-415d, and 2106.

[11] Federal statutes requiring consultations between the United States and a tribe are consistent with the duties of the United States, as trustee, to share information about trust assets with the beneficiary of the trust, to hear from the beneficiary, and otherwise to act in the beneficiary's best interests. Restatement (Second) of Trusts § 170 (Duty of Loyalty), § 172 (Duty to Account), § 173 (Duty to Furnish Information), § 174 (Duty to Exercise Reasonable Care and Skill over Trust Assets); § 175 (Duty to Take and Keep Control of Trust Assets); § 176 (Duty to Preserve the Trust Assets); and § 177 (Duty to Enforce Claims to Trust Assets).

[12] *See Indian Trust Funds supra* n.2.

with respect to its trust funds "(1) the source, type, and status of the funds; (2) the beginning balance; (3) the gains and losses; (4) the receipts; and (5) disbursements and the ending balance." The American Indian Trust Fund Management Reform Act of 1994, P.L. 103-412, § 102; *see also* 25 U.S.C. § 162a(d)(5) (requiring the Secretary to prepare and supply tribes with statements of account). The Secretary also shall "direct, or by contract, provide Indian tribes with technical assistance in developing, implementing, and managing Indian trust fund investment plans, and [] among other things, ensure that legal, financial, and other expertise of the Department of the Interior has been made fully available in an advisory capacity to the Indian tribes to assist in the development, implementation, and management of investment plans." *Id.* at § 204.[13]

The Minerals Agreement Act is another example of a federal statute that requires consultations between the United States and tribes regarding trust assets. 25 U.S.C. § 2106. This statute provides that the Secretary of the Interior "shall ensure that upon the request of an Indian tribe . . . such tribe shall have available advice, assistance, and information during the negotiation of [an agreement between the tribe and a third-party for purchase or use by the third-party of the tribe's mineral resources]." *Id.* The effectiveness of these laws obviously would be impaired if third-parties have access to statements of trust fund accounts provided by the

[13] *See e.g.* 25 U.S.C. § 1403(b)(1) (providing for legal, financial and other expertise by the Department "in an advisory capacity to the Indian tribe which is entitled to [trust] funds") and § 941i (Catawba land claims settlement fund administration provisions).

United States to tribes, business strategy or negotiating positions recommended to a tribe by the United States, or other communications regarding trust assets between the United States and tribe.

In addition, federal enforcement of claims to trust assets necessitates consultation between the United States and Indian tribes. For instance, the United States has intervened as a plaintiff in land claim lawsuits brought by USET tribes. *See supra* n. 3. These and other claims arise under the Non-Intercourse Act or other federal laws or treaties in which the United States has promised to preserve and protect land for the tribe.[14] Records of these trust consultations include attorney work product such as draft pleadings and briefs, strategy memoranda, appraisals, non-testifying expert reports, draft settlement proposals and other records that have not been shared with the adversary and that would not be discoverable in the litigation. These records also may include attorney-client communications with the United States as counsel to the tribes or with each having separate counsel.[15] Disclosure of these records under the FOIA, simply because they have been shared between the United States and one or more Indian tribes, to further the trust relationship, would deny the United States and the

[14] *See, e.g.*, 25 U.S.C. § 177; Treaty of Canandaigua (November 11, 1794), 7 Stat. 11; *County of Oneida v. Oneida Indian Nation*, 470 U.S. at 239 (declaring that Congress enacted the Non-Intercourse Act to "protect[] the rights of Indians to their properties.") (citation omitted).

[15] Federal law authorizes the United States to serve as legal counsel to Indians. 25 U.S.C. § 175 ("In all States and Territories where there are reservation or allotted Indians the United States shall represent them in all suits at law and in equity.").

tribes the protection afforded by the attorney-client and work product privileges in the cases that have been brought to vindicate the trust relationship.

If the United States and Indian tribes did not share records regarding trust assets, the records would not be available to the public. A third party's access to tribal records is barred by tribal sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (upholding tribal sovereign immunity). The records created and held by the United States alone would be exempt under any reading of Exemption 5 to the FOIA. *Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 360 (1979) (upholding exemption of commercial and financial information generated by the government); *NLRB*, 421 U.S. at 149-50 (upholding exemption of attorney work product and attorney-client communication). To make the United States publicly disclose them because they were shared between the United States and the tribe is inconsistent with the purpose of the trust. *Cherokee*, 30 U.S. (5 Pet.) at 16.

State and local governments, competitors, land owners, developers, customers and other third-parties may use access to this sensitive and valuable information to the economic disadvantage of Indian tribes. This is inevitable because adversaries will know in advance the tribe's legal theories and strategies, as well as the tribe's financial and business plans.

If the communications between the United States and tribes regarding trust assets is to be exposed, the extent and nature of the tribes' interaction with the United States will

predictably become more guarded to avoid harm to tribal assets and thus the tribe. The loss of open and candid communication between the United States and tribes will damage the ability of the United States to properly prosecute claims to trust assets, to assist tribes in negotiating commercial agreements, to invest trust funds productively, to make informed decisions with respect to whether to approve transactions involving the tribe and third-parties, and otherwise to dutifully hold and manage trust assets.

II. EXEMPTIONS TO THE FOIA NOT INVOKED BY THE DEPARTMENT IN THIS CASE PROTECT TRUST RECORDS SHARED BETWEEN THE UNITED STATES AND AN INDIAN TRIBE.

Other exemptions to the FOIA not invoked by Petitioners protect records shared to promote trust-related consultations between Indian tribes and the United States. Petitioners rely exclusively upon Exemption 5 to the FOIA, which protects privileged agency records from disclosure. USET agrees with Petitioners that Exemption 5's "intra-agency" requirement must be read so as to preserve privileged records shared during consultations between the United States and Indian tribes regarding tribal assets that the United States holds in trust. Exemption 5, however, is not the only exemption to the FOIA that protects records shared in trust from public disclosure. Depending upon the record and the circumstances surrounding it, any of the FOIA exemptions could be a proper basis for an agency to withhold it from the public. Whatever is determined with respect to Exemption 5 in the circumstances of this case

should not affect the applicability of any exemption to any other record shared between the United States and tribes in trust.

A. Exemption 3 Bars Disclosure of Trust Records.

Exemption 3 to the FOIA incorporates the disclosure prohibitions that are contained in other federal statutes. 5 U.S.C. § 552(b)(3). Exemption 3 mandates non-disclosure of information "specifically exempted from disclosure by [a] statute" that either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id.*; *CIA v. Sims*, 471 U.S. 159, 167 (1985).

Statutes incorporating the trust responsibilities of the United States to Indian tribes should qualify as Exemption 3 statutes under Exemption 3(A). *See, e.g.*, 25 U.S.C. §§ 162a(d)(5), 177, 324, 396-396g, 406-407, 415-415d, and 2106. Inherent to statutes imposing trust obligations on the United States is the obligation of a trustee to maintain the confidences shared in the trust relationship. Inasmuch as the United States is duty-bound to withhold confidential information exchanged between it and a tribe under these statutes, it has no discretion to disclose that information. *See supra* Section IA.

There is a specific statute preserving water rights guaranteed by treaty between the United States and the Klamath Tribes. 25 U.S.C. § 564m. This statute implicitly

incorporates the trust obligations of the United States arising under such treaty. It should shield disclosure of the records at issue.

B. Exemption 4 Bars Disclosure of Trust Records.

Exemption 4 bars disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Tribal trust asset information is by definition commercial or financial information. Tribes customarily keep confidential business plans and proposals, economic analyses, financial reports, draft transactional documents, and other records regarding their trust assets. For this reason alone, Exemption 4 would apply to these records. *Critical Mass Energy Project v. NRC*, 931 F.2d 939, 948 (D.C. Cir.), *vacated & reh'g en banc granted*, 942 F.2d 799 (D.C. Cir. 1991), *grant of summary judgment to agency aff'd en banc*, 975 F.2d 871 (D.C. Cir. 1992).

In addition, often records regarding tribal trust assets may be privileged from discovery by the attorney-client, work product doctrine or other discovery privileges. *Washington Post Co. v. HHS*, 690 F.2d 252, 267 n.50 (D.C. Cir. 1982). In this regard, those records at issue in this case that are the work product of counsel to Klamath Tribes regarding the Tribe's water rights would qualify for Exemption 4 protection.

A privilege of particular importance to records shared between the United States and Indian tribes in their trust

relationship is the common interest privilege. The common interest privilege, which is incorporated into both Exemptions 4 and 5, is integral to tribal trust asset management. As approved by the Court, the common interest privilege applies to communications made by the client or the client's "lawyer to a lawyer representing another in a matter of common interest." Proposed Fed. R. Evid. 503(b)(3). The Courts of Appeal have applied the common interest privilege to communications regarding current or imminent litigation, *United States v. AT&T*, 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980), and to other communications made to facilitate the rendition of legal services to each of the clients involved in the consultation. *See, e.g., Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964).

The common interest privilege is essential to Indian land claims, which often must be prosecuted by the United States to overcome Eleventh Amendment challenges by states. *See supra* n.2. Whether brought by the United States alone or in conjunction with one or more plaintiff tribes, these cases raise complex legal and factual issues regarding trust assets that require open communication between the United States and the tribes regarding otherwise privileged information. In order to advise and consult openly with respect to their common interests regarding tribal trust assets, the parties and their counsel must be assured their communications will be kept confidential.

Cooperation between counsel for the United States and tribes also is necessary to protect tribal water rights. The Klamath Tribes, the Bureau and their counsel prepared and

shared the records at issue here, which are privileged from discovery by the work product doctrine and the deliberative process privilege, in the common pursuit of the Tribe's water rights before the Department and in state court litigation. Whether or not the common interest privilege, which was not asserted below, is now available to protect the records at issue under Exemption 5, the common interest privilege should remain available under both Exemptions 4 and 5 to protect other trust records from disclosure.[16]

C. Exemption 7 Bars Disclosure of Trust Records.

Exemption 7 applies to trust records shared between the United States and Indian tribes. Exemption 7 provides that records "compiled for law enforcement purposes" are exempt from disclosure if disclosure could result in one of six enumerated harms. 5 U.S.C. § 552(b)(7). Especially relevant to trust records is the harm protected against in Exemption 7(A), which bars disclosure of records when disclosure "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7)(A). This harm flows from disclosure of trust relationship records.

The threshold requirement of Exemption 7 requires records to be "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989). Exemption 7's threshold is met

---

[16] Preservation of the protection afforded records subject to the common interest privilege is important in other contexts as well, including *qui tam* litigation under the False Claims Act, 31 U.S.C. § 3730.

easily by records shared between the United States and tribes to enforce laws protecting tribal trust assets. *See, e.g.* 25 U.S.C. § 162(a)d and 177.

Disclosure of records regarding trust assets would be harmful in ways Exemption 7(A) protects against. Disclosure of trust records "could reasonably be expected to interfere with enforcement proceedings." The term "enforcement proceedings" plainly embraces criminal, civil, and administrative proceedings,[17] whether under federal, state or another jurisdiction,[18] and thus should include land claims and state court water rights adjudications in which the United States is prosecuting claims on behalf of one or more tribes. Inasmuch as the Oregon court adjudication and the Klamath Basin federal administrative proceeding are both still ongoing,[19] Exemption 7(A) should apply to exempt the records at issue.

These and other exemptions to the FOIA, including Exemption 5, should remain available to protect trust records shared between the United States and tribes now and in the future.

---

[17] *See, e.g., Manna v. Department of Justice*, 51 F.3d 1158, 1165 (3rd Cir. 1995) (disclosure would interfere with contemplated civil proceedings); *Fedders Corp. v. FTC*, 494 F. Supp. 325, 327-28 (S.D.N.Y.) (concluding that FTC investigation into allegations of unfair advertising and offering of equipment warranties is a law enforcement proceeding), *aff'd*, 646 F.2d 560 (2d Cir. 1980).

[18] *See, e.g., Shaw v. FBI*, 749 F.2d 58, 64 (D.C. Cir. 1984) (holding that "an authorized federal investigation into the commission of state crime qualifies" as a law enforcement proceeding).

[19] Brief of Petitioner in Support of Writ of Certiorari at 10.

CONCLUSION

The Court should read Exemption 5 to the Freedom of Information Act consistently with the fiduciary and trust responsibilities of the United States to consult confidentially with Indian tribes about tribal assets entrusted to the United States and should hold that records of such consultations are "intra-agency" records protected from public disclosure pursuant to Exemption 5.

Respectfully submitted,

William W. Taylor, III
Counsel of Record
Michael R. Smith
Eleanor H. Smith
ZUCKERMAN SPAEDER,
GOLDSTEIN, TAYLOR &
KOLKER, L.L.P.
1201 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 778-1800
Attorneys for *Amicus Curiae*
United South and Eastern Tribes, Inc.

Dated: November 13, 2000